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CENTRALISING INSOLVENCIES OF PAN-EUROPEAN CORPORATE GROUPS: A
CREDITOR'S DREAM
OR NIGHTMARE

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Cases: [Eurofood IFSC Ltd, Re \(No.1\) \[2005\] B.C.C. 999 \(Sup Ct \(Irl\)\)](#)

Eurofood IFSC Ltd, Re (C341/04) [2005] B.C.C. 1021 (AGO)

[Daisytek-ISA Ltd, Re \[2003\] B.C.C. 562 \(Ch D\)](#)

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Abstract: Reflects on whether the EC's centralised approach to corporate insolvency within multinational groups of companies is likely to promote fairness to creditors. Considers the extent to which such a system fulfils creditors' expectations concerning the location of the insolvency process, discourages forum shopping and provides sufficient representation. Details, with reference to cases including the Chancery Division ruling in *Re Daisytek-ISA Ltd*, how the rights of multinational group creditors may be threatened under Council Regulation 1346/2000 and suggests a potential solution based on identification of a true centre of main interests which would ensure procedural transparency.

*468 Introduction

Recent cases of pan-European group of companies' insolvencies demonstrate the advantage in placing multinational corporate groups (hereinafter "MCGs") under insolvency in a single location, de facto subjected to a single supervision and single insolvency regime. [FN1] This is particularly favorable for global restructurings and for better results in realisations of assets and is specifically relevant when the group formed a single business or when constituent companies had significant inter-relations (hereinafter "integrated MCGs"). [FN2] Centralising the insolvency process like this holds the potential of saving the MCG as a whole, rather than splitting *469 it up into its various assets. In addition, this may also reduce the general costs as there is no need for having a

patchwork of different cases in different countries, thus resulting in better returns to creditors.

However, ascribed to the lack of rules for dealing with affiliated companies, [FN3] the EU Regulation [FN4] only provides partial and indirect means for achieving centralisation of the insolvency processes. Initially, this is only attainable when all companies involved have their centre of main interests ("COMI") [FN5] in the same state. Otherwise, if related companies have their COMI in different countries, then under the EU Regulation it is impossible to control their insolvencies from a single location and the proceedings are then handled separately. In fact, even in the case that all COMIs are located within the same boundaries, the proceedings are still separated in the sense that administration orders are issued for each company, hence creating a sort of "local" yet parallel insolvency proceedings.

Thus, it is desirable to promote a centralised approach to insolvencies within MCGs, most importantly in the sense that the insolvency regime will have the means of considering the entire group as a whole rather than looking at each part separately. Essentially, it would eliminate the cumbersome evaluation of the COMI of each MCG's constituent separately. Rather, the major consideration would be the way the group was operated and the inter-relations between its components. As a consequence, the benefits of centralisation could be achieved and realised in a parsimonious and predictable way and will not need to rely on a more "random" result of having all COMIs of the constituent companies located in a single place. Thus, related companies may be linked in the course of their insolvency and preferably their insolvency process will be handled jointly in a single forum and under a single legal regime.

However, such centralisation is not necessarily appropriate for every case of insolvency within MCGs. Certainly, it was not a mere coincidence that proved the centralisation to be so beneficial in the cases mentioned above. It was indeed advantageous because the insolvent MCGs were able to benefit from a global restructuring or centralised realisation of assets. Typically, this would not be the case when the MCG does not form a single business or when its entities are not inter-related. Hence, a prerequisite for applying a centralised approach to insolvencies within MCGs is that the specific MCG was an integrated one prior to *470 its collapse. More than this though, a critical aspect of such a centralised approach concerns the way its application accords with fairness considerations and creditors' expectations, which are primary considerations of an insolvency system.

This paper will focus on this paramount issue of fairness to creditors and will try to assess how a centralised approach to insolvency within MCGs can answer the crucial questions in this respect. More specifically, does a centralised process meet with creditors' expectations regarding jurisdiction and correspond with their legitimate interests regarding the insolvency location? Furthermore, can it, at the same time, overcome forum shopping? Finally, does it enable creditors' involvement in the process and provide them with adequate representation? Failing to answer these questions will deem a centralised approach unlikely to be of any real advantage to insolvency regimes. However, it will be argued in this paper that indeed a centralised approach can adequately answer those questions given that it is applied to the appropriate cases. Although it needs to overcome certain risks it can ensure the protection of creditors' rights, ultimately becoming a creditor's "dream" rather than "nightmare". Still, this outcome will only be

possible if thorough consideration will be given to certain essential characteristics of the approach which will be introduced into our discussion. Eventually, it will be clear how a centralised approach may in fact better reflect creditors' rights compared with an approach that segregates affiliated companies (operating in different states) in their insolvencies.

Creditors' expectations and interests with regard to the insolvency location

Creditors' expectations are fundamental to the issue of international jurisdiction in which to handle cross-border insolvencies. [FN6] Since presently there is no prospect of achieving unification of domestic insolvency laws, [FN7] placing the proceedings in different places (therefore subjecting the process to different legal regimes) will undoubtedly affect legal rights of certain creditors. For instance, the ranking of *471 a particular debt may be different under different insolvency regimes. Thus, a particular creditor may gain a lower (or higher) recovery from the estate of the company according to the location in which the proceedings are held. Clearly, creditors should be able to foresee where the insolvency of a company is going to take place and calculate their risk accordingly. [FN8]

One view may suggest that, as a rule of thumb, the location of proceedings of any member of a group (and the corresponding law and forum that should supervise the process) should always be determined for each company separately. That is, without any considerations of the connections a particular member may have had with another related company or with a "group" (even if this is beneficial for the group as a whole). Supposedly, creditors are related to a certain company and not to a group of companies. Therefore, they expect to enforce their rights upon it and to open insolvency proceedings in the place of its main operations regardless of any possible links to some "group centre". In any case, their rights should not be prejudiced because of any "group" considerations, as it will not be fair to them. Thus allegedly, in the name of "unification", a centralised approach may collide with creditors' expectations and may not fit with their views regarding the forum that should supervise the process. [FN9] However, it could be that creditors may have actually dealt with a subsidiary as if it was the entire group or otherwise were given the impression that the whole weight of the group is behind the specific subsidiary they were dealing with. In such cases, treating the insolvent subsidiary separately will actually discord with its creditors' expectations.

Whichever is the case, it is clear that one obstacle that a simplified "segregating" approach will have difficulty to face is that different creditors involved with the group may have different interests and expectations regarding the location in which a certain member's insolvency will be handled. Creditors of a certain subsidiary may wish that the company will be separately managed, while the creditors of other related companies would expect all proceedings to be conducted jointly since according to their view they were given the impression that they deal with the entire group and not only with a well-bounded part. Moreover, elements of both types of dealing could be found among creditors of the same company within a group. In fact, applying the simplified rule of treating each company separately without taking into account the group context may result in significant unfairness towards the majority of the MCG's creditors.

Furthermore, more often than not, a thorough examination of the facts pertaining to a group's insolvency which was integrated may reveal that it was indeed clear to "locally

oriented" creditors (of local subsidiaries) that they dealt with a member which was part of a group. Evidently, they may have negotiated with a holding company located elsewhere, or their contracts may have been subjected to the laws under which the parent company was operating. They may have supplied products to other members of the group or had other dealings with the various parts of the business. They may have received a guarantee from the parent company, and so on. Examining the way the group was operating and *472 the way creditors were doing business with the corporation will, therefore, most likely point out to a single location from where the group was managed and in which insolvency proceedings can be handled for the entire group. It could be conceptualised that the genuine expectations of creditors should fit with and stem from the way the MCG was actually structured and managed. Therefore, focusing on the "business reality of the MCG" could assist the court in verifying creditors' expectations. In addition, the court would need to "step back" and look at the way creditors dealt with the group from an objective perspective (using the notion of what a "reasonable creditor" would have expected in the specific scenario) rather than basing its decision on the expressed subjective beliefs of creditors. [FN10]

There could also be situations where the creditors did not know precisely which entity within a group they were dealing with and where it was incorporated or held its main operations. Indeed, the increasing complexity of a technologically advanced business world (where enterprises may operate through a baffling network of corporate relations) leads to greater difficulty in establishing which company within the enterprise is actually at fault, making it hard even for more sophisticated creditors to ascertain the proper entity against which to open proceedings. In cases of small unsecured creditors, there is an even greater difficulty in clearly identifying the corporate actor with whom one was contracting or suffered injury. [FN11]

All in all, it seems that a "global look" on the situation, one that takes into account the various entities and creditors involved, is for the creditors' benefit. It is only when considering all relevant parties' expectations and interests that a just and fair solution could be devised. A particular court will then be able to evaluate all relevant interests and expectations and determine whether the creditors as a whole could have ascertained a particular location as the centre of the entire group, so that it will be justified to conduct the various proceedings of the relevant entities from such identified location, rather than handling separate processes in each country hosting a subsidiary. Alternatively, the court may conclude that creditors dealt with their debtor on a separable basis with no regard to its relations with the group, consequently allowing for the distribution of the proceedings.

As noted above, in many cases of integrated MCGs it will be evident that creditors knew they were dealing with a member of a group, and they actually had relations with other members of the group or with the debtor's parent. Yet in certain other cases, it could be realised that creditors may have dealt separately with an autonomous subsidiary, [FN12] even if this subsidiary was a part of a single *473 unitary business integrated within a group. In those particular circumstances where local entities had a significant degree of autonomy (which was reflected in the way creditors have dealt with it), it is reasonable to assume that such creditors expect to have the main process against the particular entity in the country in which it operated. Hence, "shifting" the proceedings to a different location can be regarded as unjustified in these scenarios. Nevertheless, as the entire MCG is still an integrated enterprise, the creditors as a whole may benefit from

some sort of centralisation and a common direction in handling the entire insolvency process.

Evidently, it seems most appropriate that a decision regarding the location of proceedings should take into account the expectations and views of the group's creditors as a whole and not only a specific subset of them. Thus, in order to accurately consider the various expectations involved and to reach a just and appropriate decision, one single forum should be able to evaluate the various views and decide on the appropriate weight each should be given. Consequently, this methodology will be able to accommodate both the scenario of creditors expecting to have a sort of unified process for the entire MCG as well as the case where creditors dealt with a specific subsidiary as a completely separated entity. Thus, it will form a more flexible tool that accords with creditors' expectations and the way the enterprise was operated and at the same time provides the benefits of centralisation. Conversely, a "one size fits all" mode, according to which proceedings of affiliated companies are always handled at a single location or alternatively always conducted in separate places with no connection between the various proceedings, will not fit with the goal of protecting creditors' rights.

Creditors' forum shopping

It is not always a matter of genuine expectations that lead creditors to pick up a certain jurisdiction in which to open insolvency proceedings against a debtor (belonging to a group). Rather, it may sometimes be mere interests (not necessarily or entirely "legitimate") that direct creditors to a particular forum. As national regimes differ in their dealings with group matters in the context of insolvency, [FN13] creditors may have incentives to select a particular forum over another in the event of a group collapse or insolvency of any of its members. [FN14] In certain circumstances, local creditors may wish to subject certain subsidiaries to local supervision even *474 though they were aware of it being an integral part of the MCG (and even though the group as a whole will gain profit from a joint process). This could stem from the local insolvency regime being better suited to their aims regarding the debtor and/or from their desire to apply close control over the insolvency. As this forum manipulation may affect other creditors of the MCG and may usually be unfair, applying a centralised approach may prove preferable in this respect as well. The strength of such an approach is that it may disregard "pure" formalities that may obscure the "real" state of affairs of the group at stake (for example, where the group was fragmented into separate entities yet all operated a single business directed and managed from a single location). By definition, manipulations can be done more easily under a "formal" regime. If the "economic truth" is disregarded and no weight is given to the real connections between the companies at hand, unjust outcomes are more probable, and the difficulties to "control" manipulations augment. Obviously, when the system being used strives to reflect the state of affairs prior to the onset of the proceedings and makes use for this end of a broader evaluation of the MCG as a whole, creditors' manipulation will be drained of its essence.

In any case, in order to truly overcome creditors' forum shopping, the method applied should designate the place to which the group as a whole has the strongest connection as the appropriate forum for the handling of the MCG insolvency process--that is, a centre of main interests of the entire enterprise. [FN15] This way parties will find it more

difficult to "elude" the proper jurisdiction and to choose a different but more favourable one when commencing insolvency proceedings.

Rights of involvement and adequate representation in the group context

The actual course of insolvency within a corporate group may be relevant not only to members directly under the proceedings but also to other affiliates which may be located in other states. It is very likely that the financial situation of one member may influence another, that there may be mutual claims or that there may be questions of group liability. These affiliates' insolvency proceedings may take place concurrently in different locations, or alternatively they may not be under insolvency at all at that time. In this type of case it is particularly important that the wishes and views of creditors of affiliated companies will be heard. In this respect, a centralised approach that gives authority to a certain court to look at the group insolvency as a whole may ensure that creditors of related companies will be given a stage on which they will present their views and that they will be taken into account.

On the other hand, a centralised approach may present a risk of neglecting creditors and therefore compromising their involvement and representation rights. Apparently, handling the proceedings of each entity separately and locally is better suited to ensure the participation of creditors in the process of the subsidiary, to which they directly relate, in the easiest and most accessible manner. Conversely, *475 if a subsidiary's insolvency is handled in some externally identified centre, certain creditors who might not have the sufficient means to embark on a multinational legal expedition (or for any other reason) may not be consulted even when a decision that pertains to them (and in which their expectations should be taken into account) is made. It could involve, for instance, the decision of opening proceedings in a specific location as well as the ongoing handling of the proceedings once they were opened. In fact, it may also be the direct consequence of a central administration that lacking any explicit guidelines and directions is more likely to be concerned with a certain party's needs and expectations while forsaking those of other, perhaps more "remote" creditors.

This scenario also poses the risk of culminating into a de facto substantive consolidation [FN16] mostly for the sake of convenience of the administration rather than any substantial reason. Thus, separate entities in essence may eventually be lumped together without giving full consideration to the expectations of the entire multitude of creditors.

Furthermore, as was indicated with regard to single debtor cross-border insolvencies and the use of the EU Regulation, there are practical disadvantages for foreign creditors due to language, distance and the differences between procedural requirements imposed by states' insolvency laws. [FN17] Applying this notion to the case of insolvencies within MCGs suggests that there is a "double" barrier to foreign creditors when they relate to a separate entity.

The problem of inadequate representation and the need for active involvement increases since there is a potential conflict of interest in supervising an MCG process in a unified manner. The appointee or appointees, if handling the whole proceedings together, may be representing different interests. This problem is surely more pronounced when a single appointee handles all the proceedings, but it is also quite prominent when there are several appointees handling the whole group. In such situations, the appointees are on the

one hand operating for the benefit of the group as a whole (and the creditors in general), but on the other hand are dealing with separate entities that might have contradicting interests. In any case, a single appointee or a closely tied group of appointees can result in an all too "cosy" situation, with the potential of neglecting certain creditors' interests.

*476 All in all, a centralised approach seems necessary in order to safeguard the rights of involvement and adequate representation when we are dealing with an integrated MCG, as this requires for someone in this entire process to see and hear all relevant voices and to be responsible to protect all interests. However, the inherent risks of a centralised system as introduced above are undeniably relevant to the application of a proper approach. Hence, if a proposed approach is to be proved justified, it will need to provide mechanisms to overcome these potential flaws.

Some examples of the difficulty under the EU Regulation to protect creditors' rights in MCG cases

The lack of an explicit solution to the particular case of MCGs within the EU Regulation poses a threat to the protection of creditors' rights. Recent cases show that without clear guidelines and protective measures with regard to the rights of creditors, the outcome may involve either insufficient consideration to creditors' rights or otherwise increased unwillingness on their part to support a unified process for the group (even though such approach would have been for the benefit of the group as a whole).

Typically in these cases, parties and courts were driven to try and devise practical solutions, to enable efficient liquidations or restructurings of MCGs as it was only natural that these cases needed such efficient mechanism to be able to reach a successful conclusion. However, lacking sufficient structured guidelines, EU courts were sometimes inclined towards the direction in which local creditors have pulled: either to protect creditors in the "territory" sacrificing the global economic consequences it may have, or enforce control over foreign members of a group even in cases where it may not exactly fit creditors' expectations. Creditors themselves have been on some occasions reluctant to accept any "joint process" as they could not be certain that their rights would be preserved during this course of action.

Parmalat

The Eurofood [FN18] subsidiary company was incorporated in Ireland; however, it was part of an Italian group that collapsed (Parmalat). Hence, the Italian administrator appointed to restructure the Italian group wished to subject the Irish company to Italian jurisdiction in order to facilitate the operation. [FN19] However, creditors of the Irish subsidiary were reluctant to accept that. They feared the consequences of such an act and could not be confident that their rights would be adequately safeguarded. They were concerned, for example, that the assets of the Irish subsidiary would *477 be lumped together with those of the rest of the group. [FN20] They preferred to have control of the subsidiary's future and thus strove to place its proceedings in Ireland. Consequently, two main parallel proceedings were opened.

Indeed, the Irish court in its decision to approve the appointment of Irish provisional liquidators to the subsidiary [FN21] emphasised the Irish company's creditors' expectations and how they viewed the company's location. The court held that it was

clearly Ireland in which the creditors expected a default to be handled as creditors were dealing with investments issued in Ireland and subject to Irish fiscal and regulatory provisions. [FN22] The Italian court, on the other hand, in its decision to open main proceedings in Italy (in relation to the same company) [FN23] seemed to have focused more on the entire group's operational structure and the Irish company's position within it. It pointed out the fact that the Irish company carried out activities instrumental to the Italian parent's group, that it was ancillary to the parent, that the parent guaranteed all transactions and that all operating and policy decisions were made from Italy. [FN24]

Clearly, there was a lack of structured guidelines for the courts to follow in determining on the proper jurisdiction where it is a case of group of companies. Consequently, each pulled to the other direction to meet the interests of the local creditors or the local administrator. The recent decision of the ECJ in the case (upholding the Irish court claim to be the proper jurisdiction) [FN25] has not resolved this difficulty. It has not provided means aimed at appreciating the benefits for the stakeholders of the group as a whole and clarifying how the various relevant interests can be safeguarded and taken into account. Rather, it entrenched the idea *478 of ascertaining jurisdiction for each subsidiary separately, [FN26] apparently focusing on the ascertainability to third parties of the particular company. [FN27]

The Parmalat case's complexities go beyond the EU Regulation's "borders", yet it would be noteworthy to take a look at other courts' and creditors' views in some other Parmalat derivatives. A Cayman Islands' court's decision also in a matter related to the Parmalat group [FN28] reflects a similar consideration of that of the Irish court. Cautious of not depriving creditors of the local subsidiary of their rights, [FN29] the court refused to subject this company to the Italian administrator control, approving the appointment of separate representatives, although conscious of the effect it might have on the cost-efficient operation of the whole process. The main reason for the court's decision was the fact that this was the wish of third-party creditors (i.e. non-related creditors)--to have separate representatives and to conduct a local process--and because of severe concerns about the administrator's ability to act in the interest of the subsidiaries' stakeholders. Indeed, the way the Parmalat's administration was being handled has been criticised as being too nationalised, focusing on seeking "an Italian solution" and lacking a sufficient international perspective. [FN30] Creditor groups involved in the Parmalat process "raised eyebrows" with regard to the sort of representation provided for such a large-scale, international case. [FN31] However, such solution as was chosen by the Cayman Islands' court (segregation in handling the group's process) poses a threat on the chances to engineer a global rescue plan and in any case has probably increased costs and complicated the proceedings. Furthermore, it seems that the court (although stating that it was mainly concerned with the creditors' wishes) considered only part of the interests involved. [FN32] It can be argued that the Cayman Islands' court did not appreciate the fact that creditors who were not present at court and may have belonged to other members of the group may have had an interest in promoting a centrally based more efficient process, supervised by a single administration.

*479 Daisytek

In the Daisytek case, [FN33] an entire group (the European part) was placed under administration in one single place; however, this resulted in much contest from the part of

the "local" subsidiaries. There was a strong debate regarding the reasoning given by the English court when it opened the proceedings against each member of the group, and with respect to the representation of the subsidiaries in this process. [FN34] It seems that a practical solution was imposed, but with much confusion and discontent on the part of foreign members of the group. [FN35] Looking at the reasoning of the English court's decision it seems that creditors' expectations with regard to the local subsidiaries' place of main interests were considered. [FN36] Furthermore, prima facie the decision was grounded on finding COMI separately for each subsidiary. [FN37]

Nevertheless, it appears that the decision was much influenced by the group situation. The court looked at the group's operational structure, and the way it was managed. [FN38] It also seems that the English administrator was mainly focused on devising an effective solution to the pan-European group. [FN39] The French and *480 German courts in first instances, on the other hand, considered the respective companies as locally situated, even though they were controlled by a parent company in the United Kingdom. [FN40] These contradicting views exemplify that an approach that would expressly address the situation of a group will make this issue much clearer, and enable the court to use the "high road" to reach its decision. Ultimately, this de facto joint administration centralised in the United Kingdom with no clear guidelines as to its operation contained a potential danger of prejudicing creditors' rights, for example in progressing from a parallel administration to a sort of substantive consolidation. [FN41]

It is submitted thus that recent experience reinforces the need for an expressed authority within a model for cross border insolvency to centralise groups' proceedings while providing sufficient rules that will accompany such authority and will protect creditors' rights.

A flexible solution focused on the ability to identify a true and predictable centre for the entire group

The starting point of our discussion was that a centralised approach is beneficial in terms of economic efficiency in cases of integrated groups. It was consequently evident that such an approach has the potential of promoting fairness in that it will enable a specific forum to consider creditors' interests and expectations relevant to the group's insolvency. Having such a "global look", taking into account the entire picture will result with the fairest outcome. All in all, the advantage of such an approach is that in the appropriate cases (namely where the MCG was integrated) it can better reflect the economic reality of the business. A centralised approach will be able to project the way the MCG operated and the way it had dealings with creditors in its ordinary course of business onto handling of its insolvency. Therefore, by mirroring the business activities prior to the collapse, it will better accord with creditors' expectations, while at the same time preventing creditors' manipulations. At its core, a centralised approach subjects the entire MCG insolvency process to a single direction. Furthermore though, it strives to handle all proceedings in a single location, thus facilitating unification and an appropriate "view from above" on the entire process. However, such an approach should be applied carefully, recognising that in the case of opening insolvency proceedings the basis of assertion of jurisdiction may in fact suggest the assertion of substantive issues as well. [FN42]

Consequently, the main feature of a centralised approach would be to identify the location into which proceedings could be centralised. In this respect, the idea of identifying a COMI for a single debtor could be extrapolated to identifying *481 a COMI for the entire integrated MCG. Thus, a group's COMI should first reflect a real nexus between the group and the proper venue to handle the joint process (hence avoiding forum shopping [FN43]). For that, it should take into account the group's operation as a whole (as opposed to looking for the COMI of each company separately). Furthermore, it is important that this centre would be a place easy to identify and to predict, so that it would accord with creditors' expectations regarding the insolvency process' location.

Accordingly, it is suggested that the COMI of a group of companies should be at the place where the high-level decision-making regarding the enterprise was performed. That is, the COMI should be assigned to the state from which the business was actually controlled and managed. Subsidiaries are generally directed from headquarters which could be thought of as the brain and nerve centre, while the subsidiaries are the limbs. [FN44] The headquarters thus reflect the "meeting point" for the various entities. The idea is hence to look for the place of command and control which will usually be located where the headquarters are situated. However, it should be the place of actual operating headquarters rather than a façade of headquarters. [FN45] Indeed, in several recent EU Regulation MCG cases, as well as other MCG cases, proceedings of the various entities comprising the group at hand were placed in the jurisdiction in which the management and control of the group was situated. [FN46] The place of main decision-making would be relatively easy to identify, and would not involve the need to "weight" the amount of operations *482 or assets the group may have had in different states (as is the case when adopting a "place of principle operations" test). [FN47]

In addition, in order to diminish the problem of creditors' difficulties in ascertaining which corporate entity they were dealing with and where its proper location was (for the purpose of insolvency), a centralised approach could also set up rules for transparent representation of a company's centre of main interests and its relationship with the rest of the group. Namely, there should be an explicit reference within the company's documents as to whether it is a company which is integrated with other affiliates and (if indeed this is the case) where the centre of main interests of the group is located. This should include a positive duty cast on each company (which is a member of an MCG) to proclaim this information on its business documents. Furthermore, the company's auditors may be asked to validate the accuracy of those representations on an annual basis, and report whether indeed it matches the way the business is operating. Such representations can be also included in various transactions' documents in which the company is involved. [FN48] It may also incorporate statements and prohibitions on any actions taken by the company or its affiliates which may result in the alteration of the above location to another jurisdiction or the position of the company within the group. This will help in robustly protecting creditors and in avoiding the potential gap between "impression" and "reality" of the companies' operations and their effects on jurisdiction matters.

Yet, as a centralised approach is supposed to reflect the actual characteristics of the MCG at hand prior to its collapse and creditors' expectations regarding the location of the insolvency process, it must acknowledge the fact that even in the case of an integrated MCG, various operational structures may be involved. Accordingly, it might not be appropriate in certain cases to place all the companies' proceedings in the identified

centre for the entire group. Typically, this will involve cases of groups that were significantly decentralised (the subsidiaries autonomous to a significant degree) although operating a single business. [FN49] The approach should *483 thus provide that if indeed a local subsidiary of an integrated MCG operated with a substantial autonomy which in turn was reflected in how creditors dealt with it, [FN50] its proceedings may be handled separately and locally. However, it should still maintain that such local proceedings will be subjected to the process conducted in the MCG's centre.

This flexible methodology will make it possible to contain both the cases in which all subsidiaries should be located at the MCG's COMI and those other cases in which certain subsidiaries are in fact locally separated. Thus, it will overcome the short-handedness of the "black or white" solution imposed via the EU Regulation. Consequently, in cases involving local proceedings of autonomous subsidiaries, the place of main decision-making should be given the supervisory role over the entire process. The amount of control exerted over the other affiliates' processes should be appropriated according to the circumstances, depending on the specific case and the amount of co-ordination required.

In addition, some scenarios of MCGs' insolvencies may present difficulty in centralising the process or even applying single supervision. For instance, where the controlling entity is not under insolvency (e.g. a bundle of insolvent subsidiaries without the parent or an individual shareholder), or where the integrated group is divided between two sub-groups (a "twin holding" structure [FN51]); it would be difficult to ascertain a single place of common control. For these scenarios a "second best" test could be provided which will involve the location of the group's main operations mentioned above. [FN52] It might be possible in this way to point to one of the affiliate's locations as the place with the major volume of assets and activities. However, as this is a problematic test, there is a chance it would still be impossible to locate a centre in such cases. If indeed a centre could not be identified, and if the parties themselves could not agree on a mutual "centre" in which proceedings should be handled, then other global mechanisms would need to be imposed in order to achieve the benefits of a linked process. This may include close co-ordination and co-operation, mutual recognition, access and relief (as provided in cross-border models to single debtors).

In any case, a global approach will still need to deal with possible strategic manipulations that may be taken by debtors, moving the group's headquarters [FN53] or using successive filings [FN54] to pick a preferable jurisdiction for the MCG in anticipated distress. If the approach will be too fragile and prone to manipulations, *484 creditors' expectations will not be met and the identified centre most probably will not reflect their views with regard to the MCG's operation. In order to overcome manipulations of the MCG's centre being taken at the eve of insolvency, a global model should look for the real centre of control for a set amount of time prior to the insolvency. [FN55] In case there was more than one such place within this period of time the model should designate the venue in which the place of control was residing longer. [FN56] It should also take into account the entire group situation and preferably place all affiliates under the insolvency regime, to avoid the downsides of successive filings by debtors related to a group. However, if the entity which exerted control over the various affiliates joins the process only after proceedings against the other affiliates already started to a substantial level, then it should be permissible to move or alter the supervisory authority to the court where this entity is located.

Ensuring a transparent process and objectivity in representation

Even if the circumstances provide that a fully centralised process is compatible, it should still address the issue of representation and involvement of foreign creditors in the centralised process. Thus, a global approach should ensure that courts will be presented with the entire picture when considering the path an MCG insolvency process should take or with regard to other matters pertaining to the insolvency (this may include the decision on the location of proceedings, the administration and supervision over the process or the decision on any sort of consolidation to be imposed, and so on). The court should be able to take into account interests of all creditors relevant to the process, appreciating the significant consequences of particular decisions on creditors' rights. [FN57] This should *485 include foreign creditors, as well as creditors of affiliates who are relevant to the process (in the sense that they may be integrated within the group or have other claims that should be considered [FN58]--hereinafter, "relevant affiliates"). For that purpose, courts and administrators should be responsible for notifying creditors and other administrators of relevant affiliates about the opening of proceedings against a particular member within the group and of any relevant court hearings and orders. [FN59]

The parties opening the case should provide full information and evidence in respect of the MCG scenario, its way of operation and the financial status of other relevant affiliates. Information should also include various matters pertaining to the insolvency that may affect other affiliates, such as decisions on the location of the proceedings and hearings that are going to take place regarding the application of any specific mechanisms needed in the relevant circumstances. [FN60] Creditors of relevant affiliates should also get access to proceedings being located in a foreign country and get equal treatment in terms of lodging claims to a joint administrator [FN61] and voting on a global plan or other sort of insolvency operation (if indeed any sort of joint administration was actually applied). Bearing in mind the complex scenario of insolvency within an MCG, it should be provided within a centralised approach that creditors' wishes should be considered even if they are not physically present. The benefits or possible unfairness should be examined with as much consideration as possible of the creditors in general. In this process of evaluating creditors' wishes, a fair balance should be made between the various interests. The nature of claims is also relevant, namely whether third-party creditors' wishes are at stake or those of creditors who are also shareholders or connected to the former management of the company, embracing the idea that related creditors should be entitled to less weight in the overall equation. [FN62]

Finally, a unified global system should provide rules to ensure the objectivity of the administration supervising a group's process and its capability to represent a variety of interests relevant in the case of MCG. In this respect, an international firm with an international perspective may be more adequate to deal with MCG cases (than a nationally oriented administrator), especially those involving large groups *486 operating across the globe. Clearly, when the case involves separate entities that operated in different states with foreign creditors at stake, problems of potential conflicts of interest and inadequate representation of creditors may augment.

Concluding remarks

It is suggested that a centralised approach to insolvencies within MCGs is, principally, for the benefit of the creditors involved with a group. However, this conclusion is dependent on providing adequate tools and protective measures to ensure that creditors' voices are heard, that they are adequately represented in the process, and that a solution which is compatible to the specific scenario is imposed. We have not dealt here though with the various means a compatible approach to insolvencies within MCGs should encompass in order to deal with substantive issues that may arise in the course of an MCG's insolvency. Issues such as abuse within the group or intermingling of assets and debts between entities will have profound implications on creditors' rights of equal distribution from the insolvent estate. The road to a compatible global approach to insolvency within an MCG must pass through these points as well. For the time being, though, we will be content with the basic notion that a centralised approach could indeed become a creditors' dream.

FN The author acknowledges the contribution by Prof. I.F. Fletcher to this article.

FN1. See for instance the cases of Daisytek-ISA Ltd, Re [2003] B.C.C. 562 (May 16, 2003, Chancery Division, Leeds D.R.); Crisscross Telecommunications Group, Re (unreported, May 20, 2003, Ch D); and Norse Irish Ferries & Cenargo Navigation Ltd, Re (unreported, February 20, 2003, Ch D). More recently, the MG Rover group of companies (see the administration proceedings in the Birmingham District Registry of the High Court (the judgment handed down on May 11, 2005 is available on the EIR Database at: www.eirdatabase.com)) and Collins & Aikman Corp (see [2005] EWHC 1754) were both placed under a main insolvency process in the United Kingdom to enable a pan-European restructuring. Conversely, in the case of KPN Qwest NV data communication group, the global network (owned by separate entities) was sold in parts, which was significantly disadvantageous (Estate Gazette, "Leading data hosting site offered at a 55M GBP discount" September 14, 2002, NEWS, p.43; Globalturnaround, "KPNQwest in sales drive", June 2002, Issue 29, p.11; R. Van Galen, "The European Insolvency Regulation and Groups of Companies", October 2003: www.iiiglobal.org/country/european_union/Cork_paper.pdf).

FN2. That is the MCG was integrated to a significant extent rather than operating as a sort of conglomerate with no considerable linkage between the components, or as an investment company (see Blumberg, "The Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations" (1983, Supp.1992), pp.432-438).

FN3. As was expressly indicated in the Report Virgos/Schmit (1996), para.76, and as is evident from the recent ECJ judgment in the case of Eurofood, where the Court refrained from developing a clear "group concept" with regard to the notion of Centre of Main Interests (see fn.5 above). Though the Court has not excluded the fact that a subsidiary is controlled by a parent as a relevant factor in determining on the proper jurisdiction, the focus was on the whereabouts of the registered office and operations of the particular subsidiary (see Eurofood IFSC Ltd (Case C-341/04) [2006] B.C.C. 397 (hereinafter "the ECJ decision in Eurofood"), at [26]-[37]). This was also the approach taken in the

Opinion of the Advocate General in the case which stressed that the Regulation applies to individual companies and not to corporate groups (see Eurofood IFSC Ltd (Case C-341/04) [2005] B.C.C. 1021 (AGO), at [106]-[126]).

FN4. Council Regulation 1346/2000 on Insolvency Proceedings, [2000] O.J. L160/1 (here-in-after "EU Regulation") (www.europa.eu.int/eur-lex).

FN5. Art.3(1) & (2) of the EU Regulation.

FN6. Thus, the EU Regulation, applying the idea of having one centre for single debtor worldwide insolvency, provides that a major factor in determining where the main proceedings of the debtor should be taking place is third-party expectations (recital 13 of the EU Regulation (cited above fn.4) provides that the fact that a particular place is the centre of the debtor's main interests must be "ascertainable by third parties"). See also Report Virgos/Schmit (No.75); Gevean Trading Co Ltd v Skjevesland [2003] B.C.C. 209; Daisytek, cited above fn.1; Eurofood IFSC Ltd [2004] B.C.C. 383; Parmalat Hungary/Slovakia, Re (Municipality Court of Fejer, June 14, 2004); Ci4net.com Inc [2005] B.C.C. 277 (Ch D); The ECJ decision in Eurofood (cited above fn.3) at [33]-[37] emphasised the significance of transparency and ascertainability by creditors regarding the location of the COMI; see also B. Wessels, "International Jurisdiction to Open Insolvency Proceedings in Europe, In Particular Against (Groups of) Companies", Working Papers Series, Institute for Law and Finance, Johann Wolfgang Goethe University ([www.iiiglobal.org/country/european union/InternJurisdictionCompanies.pdf](http://www.iiiglobal.org/country/european%20union/InternJurisdictionCompanies.pdf)).

FN7. See I.F. Fletcher, "The European Union Regulation on Insolvency Proceedings" [2003] INSOL International, Cross-Border Insolvency, A Guide to Recognition and Enforcement 15, at p.30.

FN8. See fn.6 above.

FN9. See, e.g. the arguments that were put in the Daisytek case (see fifth section below).

FN10. Such beliefs may veritably be driven by creditors' interests regarding the forum-- "forum shopping" (see the issue of creditors' manipulations below).

FN11. See J.L. Westbrook, "A Global Solution to Multinational Default" [2000] 98 Mich. L. Rev. 2276 at p.2314.

FN12. It has been suggested that the size of the group, the type of products it manufactures, the degree of integration of activities with the other members of the group, the targeted market and the degree of ownership are relevant factors to consider for determining the degree of autonomy a group's constituent company has (OECD Structure and Organisation of Multinational Enterprises (Paris, 1987), p.35).

FN13. This is true with regard to the adherence to the corporate legal personality, the availability of remedies relevant to the case of the group's insolvency and issues of

jurisdiction, enforceability of judgments and assistance with regard to insolvency within a transnational group. For instance, different countries use different circumstances to justify "lifting" the corporate "veil" or operating other doctrines and concepts (such as "enterprise law") for the purpose of imposing group liability or interconnecting separate entities in the course of their insolvency (see, for instance, the reforms in this respect in the New Zealand law and the mechanisms of procedural and substantive consolidation and subordination available under the US bankruptcy regime, and on the other hand the more strict application of the entity doctrine under English legal regime).

FN14. Manipulations by debtors will be discussed in the sixth section below.

FN15. The identification of which will be discussed below.

FN16. Combining the assets and liabilities of the affiliates in the course of insolvency. This approach is acceptable in the appropriate circumstances in certain national insolvency regimes (American bankruptcy courts have been using their general "equity powers" provided in the Bankruptcy Code to order "substantive consolidation" (see 11 USC, s.105 (2000)); using s.271(1)(b) of the New Zealand's Companies Act 1993, the courts there can order that proceedings of two or more related companies will proceed together as if they were one company). It has also been de facto applied in certain multinational corporate groups' insolvency cases such as the case of BCCI (see for instance in Bank of Credit & Commerce International SA, Re (No.11) [1997] 2 W.L.R. 172, Ch D), which includes background on the BCCI liquidation and a description of the agreements made between the liquidators. The circumstances in which such a mechanism should be applied within an approach to MCGs' insolvencies is not within the scope of this paper.

FN17. See I. F. Fletcher, cited above fn.7, at p.41.

FN18. See Eurofood, cited above fn.6.

FN19. The Italian administrator asked the court in Parma to declare the company insolvent. The Parma court accepted the petition and placed the company under Italy's jurisdiction (see Eurofood IFSC, Re (Trib I), February 19, 2004 [2004] I.L.Pr. 14) even though provisional liquidators were previously appointed by the Irish court.

FN20. See "Italian and Irish courts clash over Parmalat", Globalturnaround, April 2004, Issue 51, p.3.

FN21. Eurofood, cited above fn.6.

FN22. *ibid.* Moreover, it stated that no adequate notice was given to the company's creditors and to the Irish provisional liquidator on the Italian hearing.

FN23. Eurofood IFSC, Re, cited above fn.19.

FN24. *ibid.* The battle is still ongoing. (On May 27, 2004, the Irish Supreme Court decided to refer to the European Court of Justice several questions, *inter alia*, whether the Irish or Italian courts opened main proceedings first and whether the Irish courts were entitled to invoke the public policy exception to recognition. See also P.J.M. Declercq, "Restructuring European Distressed Debt: Netherlands Suspension of Payment Proceeding ... The Netherlands Chapter 11?" [2003] 77 Am. Bankr. L.J. 377 at p.383, fn.30 (referring to the judgments given with regard to Eurofood). A preliminary opinion, by an Advocate General attached to the European Court of Justice, was published on September 27, 2005. The Advocate General considered that the appointment of a provisional liquidator by the Irish court was sufficient to commence proceedings under the Regulation. He also considered that the Regulation applied to individual companies, not groups of companies (Opinion of A.G. Jacobs on September 27, 2005, Case C-341/04).

FN25. The Irish Supreme Court referred a number of questions to the ECJ concerning the proper jurisdiction issue and recognition of main proceedings (Eurofood IFSC Ltd [2005] B.C.C. 999).

FN26. The ECJ decision in Eurofood, cited above fn.3, at [26]-[37].

FN27. *ibid.* See also fn.3 above.

FN28. See the judgment of the Grand Court of the Cayman Islands in the administrator application to replace the provisional liquidators appointed to a Cayman Islands' subsidiary of Parmalat--Parmalat Capital Finance Ltd (Grand Court of the Cayman Islands, March, 2004) (hereinafter "the Cayman Islands' court's decision"). I am grateful to Mr Michael Crystal Q.C. of 3/4 South Square, who represented the Joint Provisional Liquidators in their successful response to the Italian administrator claim to replace them in their appointment, for supplying a copy of this document. See also D. Reilly, "Judge Rejects Administrator's Push To Control Parmalat's Cayman Units" in DOWJONES Newsletters, International Insolvency, March 2, 2004, p.1.

FN29. The Cayman Islands' court's decision at pp.8-12 & 21-23.

FN30. See Globalturnaround, January 2004, Issue 48, p.3 and February 2004, Issue 49, p.4.

FN31. *ibid.*

FN32. The court considered the position of the Noteholders of the three Cayman Islands subsidiaries at stake (Parmalat Capital Finance Ltd, Food Holdings Ltd and Dairy Holdings Ltd), while giving less weight to the views of related company creditors (see the Cayman Islands' court's decision, cited above fn.29, p.15). It seems that it did not take into account, however, potential views of other external creditors of other members of the group.

FN33. Daisytek, Re, cited above fn.1.

FN34. See C.G. Paulos, "Zuständigkeitsfragen nach der Europäischen Insolvenzverordnung", International Insolvency Institute (www.iiiglobal.org/country/germany/insolvenzverordnung.pdf). See also B. Wessels, cited above fn.6.

FN35. However, progress in this regard has been made--for instance, when the Munich court in first instance decided in another case to place insolvency proceedings against an Austrian subsidiary in Germany (where the parent company was situated). The Munich court found that all the headquarters functions of the Austrian subsidiary were carried out at the premises of the parent in Germany. The court also expressly followed the decision of the English court in Daisytek, and contributed to the development of a consistent EU-wide interpretation of the EU Regulation (see Amtsgericht (Munich, Hettlage-Austria, unreported, May 4, 2004, Germany; G. Moss, "Daisytek followed in New German Case" (2004) 17 *Insolv. Int.* 141-142). Another step in this direction was recently taken by the Nanterre court (France), appointing French administrators for several subsidiaries of the Emtec MCG incorporated in different European countries (see GLOBALTURNAROUND, "French revolution on COMI", March 2006, issue 74, p.1).

FN36. See Daisytek, Re, cited above fn.1, at 7-8.

FN37. *ibid.*, at 5-8.

FN38. The court stated for instance that:

"the evidence shows that the trading companies in the group are managed to a large extent from Bradford and that they are managed and controlled as a group so that the activities of the group companies throughout Europe are co-ordinated by the head office in Bradford".

It also indicated that the English parent, who performed the head office function for the group, gave various guarantees to major suppliers and trade creditors of its subsidiaries (*ibid.*, at 2).

FN39. The English appointee attempted to facilitate a pan-European restructuring by opening proceedings for the different companies comprising the European division of the group at the same place (the United Kingdom). The idea was to administer the proceedings jointly, instead of having a "patchwork of different cases in different countries" (see S. Taylor, "Daisytek chain reaction", *Globalturnaround*, July 2003, Issue 42, p.10).

FN40. Daisytek, Re (Tribunal de Commerce, Cergy-Pontoise, July 1, 2003); Daisytek, Re (Dusseldorf County Court, May 19, 2003; July 10, 2003).

FN41. See fn.16 above.

FN42. See second section above.

FN43. See third section above.

FN44. C. Tugendhat, *The Multinationals* (1971), pp.22 & 23.

FN45. In the case of BCCI, for instance (see fn.16 above), the group had only a "brass plate" headquarters in Luxemburg (see A. Hill, "BCCI Debt Proposal Resisted by Creditors", *Financial Times* (London), October 8, 1992, p.22; L.M. LoPucki, "Co-operation in International Bankruptcy: A Post-Universalist Approach" [1999] 84 *Cornell L. Rev.* 696 at p.714; L.M. LoPucki, *Courting Failure How Competition for Big Cases Is Corrupting the Bankruptcy Courts* (2005)). However, its operational headquarters and effective control were in London (before being moved to Abu Dhabi, shortly before filing bankruptcy). Although the main proceedings against the group took place in Luxembourg (where the parent company was also incorporated), commentators expressed the opinion that England was the actual centre of interests of the transnational group (see I.F. Fletcher, "The European Union Convention on Insolvency Proceedings: An Overview and Comment, with U.S. Interest in Mind" [1997] 23 *Brook. J. Int'l L.* 25 at p.37).

FN46. In Crisscross, for instance, the actual headquarters were located in England. The High Court placed all the companies under insolvency in England although subsidiaries were incorporated in different countries (Crisscross, cited above fn.1). Proceedings of affiliated companies were also placed at the location of main decision-making in other EU Regulation cases, such as *Daisytek, Re*, cited above fn.1; *Cirio Del Monte* (Italian Court of Rome, August, 2003, unreported); *Parmalat Hungary/Slovakia, Re*, cited above fn.6; *Enron Directo SA, Re* (England, Ch D, July 4, 2002, unreported); *Hettlage-Austria* (unreported, May 4, 2004, Germany); *Collins & Aikman Corp*, cited above fn.1. In the case of *Bramalea*, a US-Canadian group of companies (an unreported case in the Ontario Court of Justice), Canada was the jurisdiction supervising the reorganisation. Although the day-to-day operations of US affiliates were carried out and managed locally, large strategic decisions were likely dealt in Toronto, where the group's head office was located (see R.G. Marantz, "The Reorganization of a Complex Corporate Entity: The Bramalea Story" in J.S. Ziegel (ed.), *Case Studies in Recent Canadian Insolvency Reorganizations* (1997), pp.17-18).

FN47. As was noted elsewhere, in many cases, a company's operations will be spread among several countries so that none has a majority. In some cases, the principal assets will be either mobile or outside the boundaries of any country (L.M. LoPucki, "Co-operation in International Bankruptcy: A Post-Universalist Approach", cited above fn.45, at p.716). Similarly, in the case of a corporate group, assets and operations may be spread among entities and countries in a way that would make it difficult to identify a single centre.

FN48. For instance, in structured finance transactions involving special purpose vehicles ("SPVs") (see "Europe leads world in Forum Shopping", *Globalturnaround*, June 2003, Issue 41, p.2).

FN49. Transnational businesses may be linked by contract rather than equity and may be organised with a high degree of decentralisation. Such enterprises may still display systems of managerial control and productive co-operation or have a significant level of interdependence (see P.I. Blumberg, *The Multinational Challenge to Corporation Law: The Search For A New Corporate Personality* (1993), p.142; P.T. Muchlinski, *Multinational Enterprise and the Law* (1999), p.327; G. Teubner, "Unitas multiplex: corporate Governance in group enterprises" in D. Sugarman and G. Teubner (eds), *Regulating Corporate Groups in Europe* (1990), pp.67 & 87-92).

FN50. See second section above.

FN51. See for instance the case of the Unilever group in J. Keir, "Legal Problems in the Management of a Group of Companies" in C.M. Schmitthoff and F. Wooldridge (eds), *Groups of Companies* (1991).

FN52. See fn.47 above and accompanied text.

FN53. See, for instance, the case of BCCI (see fn.16 above) where the group's headquarters were moved to Abu Dhabi shortly before filing bankruptcy (see R. Donkin, "Troubled BCCI Shifts Base to Abi Dhabi", *Financial Times* (London), September 20, 1990, p.34).

FN54. Namely, manipulating the order in which group members file insolvency petitions, by filing initially by one or more members of the group followed later by filings of other members, postponing for instance the filing of the controlling entity to a later stage, making it difficult to then transfer the process to the centre of the group (see L.M. LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach", cited above fn.45, at pp.722-723).

FN55. See also the case of *Ci4net.com*, cited above fn.6, in which the judge stressed that the COMI must have some degree of permanence (it should not move around with the location of the directors) (England, Ch D, May 20, 2004).

FN56. Resembling the English rule that resolves a jurisdictional dilemma which arises when the debtor's residential address or business address has changed from one insolvency district to another within a six-month period prior to the presentation of insolvency petition. The insolvency rules provide that the court within whose jurisdiction the debtor has been resident for the longest time prevails even if it is not the current address at the time of filing (Insolvency Rules 1986, rr.6.9.(4), 6.40(2)(c); see also I.F. Fletcher, *The Law of Insolvency* (3rd edn, 2002), pp.131-132).

FN57. See the case of *TXU* in which the court considered the possibility that there would be cases where the court would require evidence detailing extensively the circumstances in which the jurisdiction (in that case--the United Kingdom) has come to be or is said to be the centre of main interests of a foreign company in order to avoid prejudice of creditors' rights (*TXU Europe German Finance BV, Re*, [2005] B.C.C. 90 (Ch D); see

also G. Moss, "Creditors voluntary liquidation for foreign registered companies" (2005) 18 *Insol. Int.* 12-13).

FN58. Such as claims pertaining to group liability issues.

FN59. Similar to the provisions in the EU Regulation with regard to foreign creditors of a single debtor (see Arts 40-42 of the EU Regulation, cited above fn.4). See also the ECJ decision in *Eurofood* (cited above fn.3) which stated that the right to be notified of procedural documents and more generally the right to be heard (however regarding proceedings held against the particular subsidiary) are considered as fundamental rights, thus Member States may refuse to recognise proceedings that were opened in breach of this right on the ground of the public policy exception provided in the EU Regulation.

FN60. Such as substantive consolidation (see fn.16 above).

FN61. Similar to the provision in the EU Regulation with regard to foreign creditors of a single debtor (see Art.39 of the EU Regulation, cited above fn.4.).

FN62. This was also the view expressed by the Cayman Islands' court considering Parmalat's members' wishes presented to it with regard to the appointment of provisional liquidators to the subsidiaries in the Cayman Islands (see the Cayman Islands' court's decision, cited above fn.28, pp.9-10).

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